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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ALTURA BLVD., LLC, Plaintiff and Appellant, v. WESTERN PHOTOGRAPHIC SERVICE, Defendant and Respondent.	G037901 (Super. Ct. No. 06CC01288) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, H. Warren Siegel, Judge. Reversed and remanded with directions.

Croudace & Dietrich, Croudace, Dietrich & Parker, Debra M. Dietrich and Brian M. Colligan for Plaintiff and Appellant.

Law Office of Skinner & Skinner and Daniel E. Skinner for Defendant and Respondent.

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INTRODUCTION

Altura Blvd., LLC (Altura), sued its tenant Western Photographic Service (Western) for unlawful detainer. The court entered judgment in favor of Western because Altura had failed to deliver a timely estimate of real estate taxes to be paid by Western as part of its rental obligation. Upon our de novo review of the lease, we conclude the failure to deliver the estimate of taxes excused Western's obligation to pay the estimated taxes in monthly installments, but did not excuse Western's obligation to pay the taxes in a lump sum within 30 days of being notified of the actual amount due. Accordingly, we reverse the judgment with directions to enter judgment in favor of Altura.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Altura is the current owner of an office building on Altura Boulevard in Buena Park (the property). Western is the tenant in possession of the first floor of the property, and operates a photographic studio and processing lab there.

Altura and Western entered into a written lease dated April 5, 2004. Paragraph 5.5 of the lease reads in relevant part, as follows: "In addition to all rentals herein reserved, Tenant shall pay to Landlord annual real estate taxes and assessments levied upon the Demised Premises and a pro rata share of annual real estate taxes and assessments levied upon the Property. Landlord shall estimate the amount of taxes next due and Tenant shall pay, on a monthly basis, together with Base Rent as additional rental, the amount of Tenant's estimated tax obligation. Within thirty (30) days following receipt of the actual tax bill, Landlord shall provide to Tenant a reconciliation of the amount owed by Tenant and the amount actually paid by Tenant. If Tenant has underpaid, Tenant shall pay the additional amount owed in a lump sum within thirty (30) days. If Tenant has overpaid, the amount of the overpayment shall be credited against the payment for such taxes and assessments next coming due."

Altura acquired ownership of the property from a family trust; Western is owned and operated by the same family that previously owned the property, although Western itself was never the property owner. Before Altura became its landlord, Western had occupied the property for approximately 20 years.

Altura did not take possession or become landlord of the property until June 2005, after the conclusion of litigation involving the property. Altura received property tax bills in October 2005. Altura had not received any tax bills or accountings of tax liability from the prior owner at the time Altura acquired the property. Altura contended that on December 8, 2005, it communicated with Western by telephone, facsimile, and mail, advising Western of its share of the annual property taxes under paragraph 5.5 of the lease. Western contended it did not receive copies of the tax bills in December 2005. Western did not dispute that copies of the tax bills were sent to it on March 8 and May 17, 2006. The lease does not require Altura to provide a copy of the tax bill to Western, nor does it give Western the right to demand a copy of the tax bill or to refuse to pay its portion of the taxes due in the absence of a copy of the tax bill. Altura's managing member conceded at trial that he "should have provided an estimate to the tenants of what the taxes were going to be at the beginning of the tax year" in July 2005, but did not do so. The member also acknowledged Altura had an obligation to provide a reconciliation to the tenant within 30 days after receiving the actual tax bill, which also did not occur.

In January or February 2006, Altura's managing member asked Altura's counsel "how to collect the property taxes that were due under the lease." On February 10, 2006, Altura submitted to Western a written notice of the amounts it claimed were then due to Altura under the lease. The total of $15,198.92 included Western's prorated share of the annual property insurance premium, the 2004-2005 property taxes, and the first eight months of the 2005-2006 property taxes, as well as a late charge for one month's rent. Altura proposed an installment plan to permit Western

to pay the previously due property taxes over time, rather than in a lump sum. Western made one such payment; when Western failed to continue making the installment payments, Altura demanded payment in full of all sums then due and owing.

On June 23, 2006, Altura served on Western a three-day notice to pay rent or quit. The notice provided, in relevant part: "NOTICE IS HEREBY GIVEN that under the terms of that Lease dated April 5, 2004, by which you hold possession of the Premises, there is now due unpaid rent in the estimated amount of $15,265.97, representing a reasonable estimate of the unpaid monthly rent due under the terms of the Lease for the months of March, April, and May, 2006." This amount included at least a portion of Western's pro rata share of the property taxes from July 2005 to February 2006.

Altura filed an unlawful detainer complaint on August 9, 2006. A bench trial was conducted in October. The trial court found in favor of Western. "So in my mind this case goes back really to paragraph 5.5 of the lease agreement. And under that one, I've been giving it a reasonable business interpretation. And based on the language, I think that the plaintiff did have an obligation to give an estimate. [¶] Obtaining the information from which to do so, I think, would have been pretty easy making a reasonable estimate – based on the prior taxes would have been pretty easy by giving the increment and increase in the price of the property. [¶] But the reason for the reconciliation when the actual amount becomes known is because the way [paragraph] 5.5 is structured in common business sense is there will have been payments made and there's either going to be an overpayment or an under payment but not the total amount. [¶] So making the readjustment once you know the actual tax bill is probably not a major issue. You know, if it's over paid, you apply it to future taxes. If it's under paid, there's going to be a lump sum due within 30 days. [¶] But quite frankly, I do not agree with [Altura's counsel]'s interpretation there's an automatic lump sum due. I think that lump sum provision only kicks in if the plaintiff has met its contractual obligations to

provide an estimate and allow the amounts to be paid monthly. [¶] So we have an issue here that was – again, probably is caused by the fact that neither side had a full understanding of what the requirement was, but the contractual obligation is on plaintiff to provide the estimate. [¶] And then based upon the actual bill, the reconciliation is made. And if there's any money due that is due, this [is] a lump sum in 30 days. [¶] The long and short of it is I'm going to deny the plaintiff's request for unlawful detainer and find in favor of the defendant on that limited issue of possession because I do not think the plaintiff met the obligation under paragraph 5.5. [¶] And how the parties resolve that matter in allowing the amount to be paid since there is no dispute about what the amount is, is really not the function of this lawsuit. The lawsuit is defined by the three-day notice and I don't think the plaintiff has met its obligations in light of the specific requirements of paragraph 5.5 of the lease. [¶] So I'm going to find in favor of the defense."

Judgment was entered in favor of Western and the court awarded Western costs and attorney fees as the prevailing party, pursuant to the terms of the lease. Altura timely appealed from the judgment.

DISCUSSION

To the extent the trial court interpreted the lease provisions, we review its determinations de novo. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) To the extent the trial court made a factual determination as to whether Altura complied with the terms of the lease, we review the matter under the substantial evidence standard. (*WDT-Winchester v. Nilsson* (1994) 27 Cal.App.4th 516, 527.)

"Unlawful detainer is a summary remedy that is purely statutory in origin and is available only in those specific types of actions provided by the statute. [¶] The statute permitting an action in unlawful detainer provides special procedures for an

expeditious recovery of possession that are constitutional, but they are construed strictly to protect the tenant's right of possession." (7 Miller & Starr, Cal. Real Estate (3d ed. 2004) § 19:214, p. 663, fns. omitted.)

A tenant is guilty of unlawful detainer, "[w]hen he or she continues in possession . . . without the permission of his or her landlord . . . *after default in the payment of rent, pursuant to the lease or agreement under which the property is held*, and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made . . . ." (Code Civ. Proc., § 1161, subd. 2, italics added.) Altura was only entitled to recover possession of the property through an unlawful detainer action if it was able to prove Western was in default of paying its rent pursuant to the terms of the lease. We must therefore determine when and how Western was required to pay its pro rata share of the real estate taxes under paragraph 5.5 of the lease.

"The basic goal of contract interpretation is to give effect to the parties' mutual intent at the time of contracting. [Citations.] When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible. [Citation.] 'The words of a contract are to be understood in their ordinary and popular sense.' [Citations.]" (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc., supra,* 109 Cal.App.4th at p. 955.) Neither party offered extrinsic evidence to prove the meaning of the lease, and neither suggests extrinsic evidence should have been admitted. Rather, the parties rely solely on the language of the lease itself.

The lease required Altura to provide Western with an *estimate* of the taxes due, and required Western to pay those estimated taxes on a monthly basis. Altura failed to provide an estimate of the taxes due between July 2005 and February 2006. Instead, on February 10, 2006, Altura provided Western with a bill for property taxes for that

period. Western then refused to pay its share of the taxes in a lump sum, relying in part on the language of paragraph 5.5 of the lease.[1]

The court agreed with Western's interpretation of the lease, concluding that Altura's failure to provide a written estimate of the taxes next due *excused* Western from making the lump sum payment within 30 days of Altura's delivery of a reconciliation of the estimated amounts paid and the actual amount due. By excusing Western's lump sum payment obligation under the lease, based on Altura's failure to provide an estimate, the court implicitly held that Altura's delivery of an estimate is a condition precedent to Western's obligation to pay the amount owed in a lump sum within 30 days of the reconciliation. Although not a part of the written judgment, the court assumed that the lump sum payment was excused for purposes of possession but Western was not permanently excused from eventually paying what was owed. The court left that decision to another day, saying, "[H]ow the parties resolve that matter in allowing the amount to be paid since there is no dispute about what the amount is, is really not the function of this lawsuit." In sum, the court held that Western was excused from paying the taxes in a lump sum on a date more than *four months*[2] after the tax obligation was indisputably ascertained, despite the plain language of the lease requiring the payment to be made 30 days after that determination. Left unanswered are the questions: If the taxes were not due more than four months after the obligation was ascertained, when were the taxes due? Does the passage of additional time resurrect the previously excused obligation?

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[1] Western also cited a host of other grievances regarding Altura's performance under the lease, including billing for utilities, billing for property insurance, construction activities on the second floor of the building during business hours, and parking and parking security issues. None of those issues were the subject of the unlawful detainer proceeding.

[2] The evidence is undisputed that the taxes owed by Western were communicated to it in writing by letter of February 10, 2006, and the three-day notice to pay rent or quit was dated June 23, 2006.

We interpret the language of the lease more simply, and in a manner not requiring an answer to these lingering questions, and thereby not requiring any judicial reformation of the lease. Altura's promise to provide an *estimate* of future taxes was a condition precedent to Western's obligation to pay *estimated* taxes. And Altura's delivery of the reconciliation was a condition precedent to Western's obligation to pay the balance due in a lump sum within 30 days. (Civ. Code, § 1436 ["A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed"].) Altura's late satisfaction of these conditions did not excuse Western's performance of its promise to pay taxes, nor did it operate to delay Western's obligation to perform to a date or dates not specified in the lease.

Deconstructing paragraph 5.5 of the lease is helpful. The first sentence of paragraph 5.5 established Western's obligation to pay its share of the "annual real estate taxes and assessments levied upon the Property." The second sentence of paragraph 5.5 established *dependent covenants*, thusly: "[Altura] shall *estimate* the amount of taxes next due and [Western] shall pay, on a monthly basis, together with Base Rent as additional rent, the amount of [Western's] *estimated* tax obligation." (Italics added.) Thus, Western's obligation to make monthly payments of the *estimated taxes* was made dependent upon satisfaction of Altura's obligation to provide the estimate. If Altura failed to provide the estimate, Western was excused from any obligation to make monthly payments of the *estimated taxes*.

But that excuse does not extend to Western's obligation to pay the actual amount owed in a lump sum within 30 days of the reconciliation. There was no dispute that on February 10, 2006, Altura submitted to Western written notice of the amount it claimed was then due as Western's share of the taxes. Since Western had not been called upon to make any monthly payments of estimated taxes (and had not voluntarily done so), this written notice served to reconcile "the amount owed by [Western] and the

amount actually paid by [Western]," as provided in the third sentence of paragraph 5.5 of the lease. The amount owed (the actual prorata share of taxes) less the amount paid (zero) was manifestly the amount due.

Of course, the third sentence of paragraph 5.5 also required Altura to provide the reconciliation "[w]ithin thirty (30) days following receipt of the actual tax bill." The reconciliation was due in November 2005 following Altura's receipt of the tax bill in October. Thus, the reconciliation delivered by Altura on February 10, 2006, was about three months late. Under the lease, Western's obligation to pay the lump sum, therefore, did not arise until March 12, 2006, 30 days after delivery of the reconciliation. But that obligation was not *excused*; it was simply *delayed*. Had Altura timely delivered the reconciliation, the lump sum would have been due in December 2005, three months earlier. Were we to take the liberty of rewriting the lease (which we do not), and extend Western's obligation to pay the lump sum by the same number of months as the reconciliation was late, the lump sum would have fallen due on June 12, 2006, well before Altura's service of the three-day notice to pay rent or quit.

In sum, Western was guilty of unlawful detainer when it failed to pay the rent then due within three days of the notice to pay rent or quit. Altura was thus entitled to judgment of possession, and an award of the rent due, together with costs and attorney fees pursuant to paragraph 35 of the lease.

DISPOSITION

The judgment is reversed and remanded with directions to determine the amount of rent due Altura together with costs and attorney fees pursuant to paragraph 35 of the lease.[3] Altura shall recover its costs on appeal.

IKOLA, J.

I CONCUR:

RYLAARSDAM, ACTING P. J.

[3] The parties advised the court during oral argument that Western had vacated the premises pursuant to the settlement of a separate lawsuit. We requested supplemental briefing on the question whether this appeal is moot. It appears the settlement agreement did not resolve all pending issues in this unlawful detainer proceeding. Accordingly, although possession has been relinquished, the issues of back rent, costs and attorney fees remain to be resolved.

FYBEL, J., Dissenting.

I respectfully dissent because I disagree with the majority as to the most reasonable reading of paragraph 5.5 of the lease. I agree with the majority that the tenant is and remains obligated to pay property taxes to the landlord as provided for in the first sentence of paragraph 5.5. However, in view of the landlord's failures to provide an "estimate" of those taxes or a "reconciliation," as required by paragraph 5.5, I do not believe the landlord was entitled to possession.

The majority and I agree (1) unlawful detainer is a summary remedy, and its use is strictly construed to protect the tenant's right of possession; (2) the contract interpretation principles described in *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944 apply here, although we disagree as to their application to the lease; and (3) we apply the de novo standard of review to determine the meaning of paragraph 5.5.

The two basic differences between my analysis of this case and the majority's are:

1. The first sentence of paragraph 5.5 obligates the tenant to pay property taxes to the landlord. This obligation remains; the next question is whether the landlord is entitled to possession under the law. The answer is found in the next four sentences of paragraph 5.5, which provide: "Landlord shall estimate the amount of taxes next due and Tenant shall pay, on a monthly basis, together with Base Rent as additional rental, the amount of Tenant's estimated tax obligation. Within thirty (30) days following receipt of the actual tax bill, Landlord shall provide to Tenant a reconciliation of the amount owed by Tenant and the amount actually paid by Tenant. If Tenant has underpaid, Tenant shall pay the additional amount owed in a lump sum within thirty (30) days. If Tenant has overpaid, the amount of the overpayment shall be credited against the payment for such taxes and assessments next coming due."

Two experienced business parties agreed in a commercial lease that the lump sum payment within 30 days, referred to in paragraph 5.5, would be made if the amount set forth in the expressly agreed-upon "reconciliation" had been rendered. The 30-day lump sum due date is *only* mentioned in the context of a reconciliation. No such reconciliation, much less an estimate of taxes, was rendered by the landlord to the tenant here. The majority and I agree a lease's terms must be construed strictly to protect the tenant's right of possession. In so construing the lease, the tenant should not be required to give up possession in the face of the landlord's failure to live up to its express obligations under paragraph 5.5. If we strictly construe paragraph 5.5 to protect the tenant's right to possession, as we must, we cannot throw the tenant out for not paying a lump sum within 30 days, when the lease itself ties payment of that lump sum to a reconciliation that was not rendered.

2. How does the majority opinion avoid application of these principles to paragraph 5.5? The majority concludes that the landlord's breach of an independent covenant of the lease (to provide an estimate and a reconciliation) did not excuse the tenant's duty to pay rent, including property taxes, in a lump sum on 30 days' notice.

There are two straightforward responses to the majority's independent-covenant-and-excuse argument. First, I have read the reporter's transcript and the clerk's transcript and this argument was demonstrably never made to the trial court. Additionally, the landlord did not even mention anything about an independent covenant and excuse in its opening brief on appeal. The argument upon which the majority opinion rests and indeed the words "independent covenant" and "excuse" appear for the first time in the appellant's reply brief. It is a well-settled rule of the appellate courts that we do not consider an argument made for the first time in a reply brief, unless good reason is shown for the failure to present it before. (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1022.) No reason, much less a good one, has been presented by the landlord in this case.

The court in *Feitelberg v. Credit Suisse First Boston, LLC, supra*, 134 Cal.App.4th at page 1022, explained the analytical and legal basis for the rule, as follows: "First, as a procedural matter, plaintiff's arguments concerning injunctive relief come too late, having been made for the first time in his reply brief. [Citation.] 'Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' [Citation.] 'The California Supreme Court long ago expressed its hostility to the practice of raising new issues in an appellate reply brief.' [Citation.] '"Obvious reasons of fairness militate against consideration of an issue raised initially in the reply brief of an appellant."' [Citation.] In this case, plaintiff has offered no reason for failing to assert his arguments concerning injunctive relief earlier. 'We will not spend any judicial resources resolving this untimely claim.' [Citation.]"

Second, even if the promise to pay property taxes is an independent covenant, the question remains whether the landlord is entitled to *possession* if it fails to honor its promises to provide a timely estimate and a reconciliation. Because no such estimate or reconciliation was provided here, no lump sum payment within 30 days under paragraph 5.5 was due pursuant to the lump-sum-within-30-days provision and, consequently, no right to recover possession was triggered.

The reading of paragraph 5.5 I have proposed is, in my view, the most reasonable reading under the contract and the law. The majority's reading is not persuasive to me for the reasons I have explained. Nothing I have said amounts to a "judicial reformation of the lease" (maj. opn., *ante*, at p. 8). In fact, the analysis in this dissent *enforces* the express written agreement between an experienced commercial landlord (who by its principal's own testimony owns many commercial rental properties) and an experienced commercial tenant. As the trial court correctly observed on the record many times, the problem in this case is the landlord admittedly did not read its

own lease, and was therefore uninformed about the express requirements of paragraph 5.5 applicable to the tax year in question and did not abide by them.

FYBEL, J.